No. 86-1963

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF ARIZONA,

Petitioner,

v.

CHICAGO TITLE INSURANCE CO., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO BRIEF OF AMICI CURIAE SUPPORTING PETITIONER

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RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO BRIEF OF AMICI CURIAE SUPPORTING PETITIONER

ARGUMENT

This supplemental brief is filed by respondents pursuant to Supreme Court Rule 22.6 opposing the brief filed by the Attorneys General of Connecticut and Wisconsin, who purport to act as amici curiae.

I. Connecticut And Wisconsin Are Not Proper Amici Curiae, And Their Brief Is An Attempt To Circumvent The Proper Procedures For Obtaining Review Of The Decision Below.

The "classic role" of an amicus curiae is to assist the court "in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co.* v. *Commissioner of Labor and Industry*, 694 F.2d 203, 204 (9th Cir. 1982). A proper amicus curiae is not a party

to the litigation; the roles of party and amicus are "self-contradictory." *Id. Accord New England Patriots Football Club, Inc.* v. *University of Colorado*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979); *Clark* v. *Sandusky*, 205 F.2d 915, 917 (7th Cir. 1953).

In their brief in this Court, Wisconsin and Connecticut assert that their interest in this litigation is a generalized concern as law enforcement agencies about the proper development of the law and the purported constitutional rights of the residents of their states. Brief at 2-3. In fact, their interest is not so vague or attenuated. Both states, as purchasers of title insurance for their own benefit, are members of the plaintiff class and have a direct stake in the outcome of this litigation.

Permitting Wisconsin and Connecticut to participate in the case at this late stage as amici curiae would improperly allow them to circumvent the established procedures for commenting on the settlement as class members and appealing from the decision of the district court. Wisconsin in fact participated in the case in the district court, joining with four other states in filing objections to the proposed settlement "on behalf of themselves as purchasers of title insurance."[1] Unlike the State of Arizona, however, it chose not to pursue an appeal from the district court's approval of the settlement and did not attempt to raise any arguments concerning the settlement in the court of appeals.

Although it was well aware of this litigation and the terms of the settlement, Connecticut chose not even to object to the proposed settlement in the district court, and did not attempt to raise any arguments about the settlement before the court of appeals. In fact, prior to

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[1] Joint Memorandum for the States of Montana, New Jersey, Ohio, and Wisconsin and the Commonwealth of Pennsylvania in Opposition to Final Approval of Proposed Settlement Agreement, at 1 (March 27, 1986).

the district court's approval of the settlement, the Connecticut Insurance Commissioner acknowledged receipt of a copy of the proposed settlement agreement and stated that the Connecticut Insurance Department "would have no objection were the settlement 'benefits' as contemplated by [the] agreement to be lawfully implemented in Connecticut following Court approval of the settlement." [2]

The contents of the brief filed by Connecticut and Wisconsin also belie their role as proper amici curiae. Rather than adding anything new to the arguments already presented to this Court, the brief merely repeats the incorrect legal analysis pressed by the petitioner, which respondents have already addressed in their Brief in Opposition to the petition.[3] Those legal arguments are matters

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[2] Letter of Peter W. Gillies, Insurance Commissioner of Connecticut, dated March 17, 1986, attached as Exhibit B to Memorandum of Defendants Addressing Objections to the Proposed Settlement Agreement (April 8, 1986).

[3] Connecticut and Wisconsin also make a number of unsupported factual assertions that are flatly inconsistent with the facts as found by the district court. For example, they declare: "[I]t is an obvious fiction to state that the residents [of Connecticut and Wisconsin] even knew of the existence of the suit." Brief at 9. However, the district court found that notice by publication had been broad and effective. *In re Real Estate Title and Settlement Services Antitrust Litigation*, 1986-1 Trade Cas. (CCH) ¶ 67,149 (1985), *aff'd without op.*, 815 F.2d 695 (3d Cir. 1987), reprinted in the Appendix to the Petition for Certiorari ("App. to Pet.") at 4a through 99a, 50a-51a. Approximately 600 members of the class responded to the notice by inquiring about it, including at least 36 residents of Connecticut and 31 residents of Wisconsin. App. to Pet. at 26a-27a; Memorandum of Defendants Addressing Objections to the Proposed Settlement Agreement, Exhibit G (April 8, 1986). Connecticut and Wisconsin also assert that "genuine relief was not obtained" by the settlement, that potential claims by residents of Connecticut and Wisconsin "were foreclosed" by the settlement "without [class members] ever having the opportunity to protect their interests," and that the settlement was "inadequate." Brief at 7, 8, 9. They offer no evidence or analysis

that could have and should have been raised by Connecticut and Wisconsin as objections to the settlement before the district court and on appeal to the Third Circuit.

Because they failed to pursue their appeal rights to the court of appeals, Connecticut and Wisconsin cannot now attack the court of appeals decision in this Court, even though as members of the class they would be bound by the district court's judgment. "Under [28 U.S.C. § 1254 (1)], only a 'party' to a case in the court of appeals may seek review here." *International Union, United Automobile, Aerospace and Agricultural Implement Workers* v. *Scofield*, 382 U.S. 205, 208-209 (1965).[4] It is not too much to expect that class members, particularly those that are state governments, will honor established procedures in the district court and court of appeals for commenting on and appealing from the approval of a class action settlement. Connecticut and Wisconsin should not be permitted belatedly to circumvent those procedures by pretending to play the role of amici curiae.

II. The Brief Filed By Connecticut And Wisconsin Is Untimely.

Connecticut and Wisconsin have neglected as well to comply with this Court's rules establishing the schedule for filing amicus briefs. An amicus curiae brief may be filed only if submitted within the time allowed for filing the brief in opposition to the petition for certiorari. Sup. Ct. R. 36.1. A respondent has 30 days "after receipt of a

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to justify these assertions, which are flatly contrary to the district court's findings and conclusions. App. to Pet. at 50a-51a, 88a, 94a, 98a-99a.

[4] Connecticut's failure to avail itself of the district court's procedures for class members to object to the settlement would properly have precluded that state's participation in the case even in the court of appeals. *See Research Corp.* v. *Asgrow Seed Co.*, 425 F.2d 1059, 1060-61 (7th Cir. 1970).

petition" within which to file an opposing brief. Sup. Ct. R. 22.1. Accordingly, an amicus curiae brief in support of a petition for certiorari must be filed within 30 days after the respondent receives the petition.

Neither the Attorney General of Connecticut nor the Attorney General of Wisconsin inquired when the Petition was received by respondents. The Attorney General of Arizona, who apparently was the one who actually filed and served Connecticut and Wisconsin's brief, also did not inquire when the Petition was received by respondents.[5] If any of these state officials had inquired, they would have learned that respondents' counsel received the Petition on June 2, 1987,[6] and that both the Brief in Opposition and the purported amicus brief were due on July 2, 1987. In fact, the brief filed by Connecticut and Wisconsin was not filed until July 6, 1987, and therefore was untimely.[7]

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[5] Copies of the Connecticut and Wisconsin brief were received by respondents in envelopes bearing a Phoenix postmark and the Arizona Attorney General's return address.

[6] Attorneys in the firm of Bell, Boyd & Lloyd, counsel for two of the respondents, Chicago Title Insurance Company and SAFECO Title Insurance Company, received a copy of the Petition for Certiorari on June 2, 1987. Counsel for other respondents received their copies on June 3 and June 4.

[7] Assuming that Connecticut and Wisconsin properly had perfected their appeal rights and attempted to support Arizona's petition as parties in this Court, their brief would be even more untimely. A party's responsive brief supporting a petition for certiorari must be filed within 20 days (not 30) following receipt of the petition. Sup. Ct. R. 19.6. Under this provision, the brief would have been due on or about June 22, fully two weeks before the date it was actually filed.

CONCLUSION

For all of the reasons stated above, the brief submitted by Connecticut and Wisconsin is not properly before this Court.

Respectfully submitted,

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